

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Mailed: January 17, 2014

Opposition No. **91194974**

Opposition No. 91196358

Promark Brands Inc. and H.J.  
Heinz Company

v.

GFA Brands, Inc.

**Cheryl S. Goodman, Interlocutory Attorney:**

This case now comes up on opposer's motion, filed September 17, 2013, to strike applicant's trial brief<sup>1</sup>, and applicant's motion, filed September 23, 2013 under Fed. R. Civ. P. 6(b)(1)(B). Both motions are contested.

In support of its motion, opposer argues that applicant's brief was due on September 11, 2013, in accordance with Trademark Rule 2.128(a)(1); however, applicant filed its brief on September 17, 2013, and the brief should be stricken as untimely.

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<sup>1</sup> On September 26, 2013, opposer submitted its reply brief. Opposer states in footnote one of the reply brief that "Should the Board grant Heinz's Motion to Strike Applicant's Trial Brief (TTABVUE Doc. No. 94), the Board need not consider this submission. . . . However, in the event Applicant's Trial Brief is not stricken, Heinz hereby submits its Reply Brief."

In response and in support of its motion to reopen, applicant argues that it has established excusable neglect to reopen its time to file its brief. Applicant argues that it acted in good faith and that any possible prejudice could be cured by extending opposer's time to file a reply brief. Applicant further submits that the delay, "will have no appreciable impact on Board proceedings" and its brief will "help the Board reach a meritorious decision on the merits."

In reply, opposer argues that applicant has not established excusable neglect as its failure to timely file its brief was wholly within its control, and a misunderstanding of a rule does not constitute excusable neglect. Opposer further asserts that applicant's "unexpected problems" in formatting the brief cannot serve as a basis for excusable neglect.

The Board considers the following in determining whether a party's neglect is excusable: (1) the prejudice to the non-moving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the moving party, and (4) whether the moving party had acted in good faith. *Pioneer Investment Services Company v. Brunswick Associates Limited*

*Partnership*, 507 U.S. 380, 395 (1993), followed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

In applying these factors, the third *Pioneer* factor, namely the reason for the delay and whether it was in the reasonable control of the movant, might be considered the most important factor in a particular case. *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 UPSQ2d 1858, 1859 (TTAB 1998).

The Board turns first to the third and most important *Pioneer* factor, i.e., the reason for applicant's failure to timely file its brief on the case.

The Board finds that counsel's alleged misunderstanding of an unambiguous rule, Trademark Rule 2.128(a)(1), does not constitute excusable neglect. See *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848 (TTAB 2000). Applicant's counsel could have consulted the text of Trademark Rule 2.128(a)(1) which clearly states that "The brief of the party in the position of defendant, if filed, shall be due not later than thirty days after the due date of the first brief." Additionally, applicant could have consulted the Board's Trademark Manual of Procedure, TBMP § 113.05 (3d ed. rev.2 2013), which states "37 CFR § 2.119(c) applies only when a

party has to take some action within a prescribed period after the service of a paper upon it by another party, and service of the paper was made in one of three specified ways. . . . Similarly, the 5-day enlargement is not applicable to 37 CFR § 2.128 which sets the time for filing the briefs on the case." Therefore, the third *Pioneer* factor weighs heavily against a finding of excusable neglect.

With regard to the first *Pioneer* factor, there does not appear to be measurable prejudice to opposer should the Board reopen applicant's time to file its main brief. Opposer in this case has already filed its reply brief under the prior deadline.

As to the second *Pioneer* factor, the Board finds that a reopening of the time to file applicant's brief would cause a delay in this consolidated proceeding, but not in a significant way.

As to the fourth *Pioneer* factor, there is no evidence that applicant was acting in bad faith.

After careful consideration of the *Pioneer* factors and the relevant circumstances in this case, the Board finds that applicant's failure to timely file its main brief on the case was within its and its counsel's reasonable control and the reasons provided for its failure to do so

do not amount to excusable neglect, as required under Fed. R. Civ. P. 6(b)(1)(B).<sup>2</sup> Although the first and fourth *Pioneer* factors do not weigh against applicant, the second factor weighs somewhat against applicant, and the third factor weighs heavily against applicant. Under the circumstances, the Board finds that reopening applicant's time to file its main brief is not warranted.

Accordingly, opposer's motion to strike is **GRANTED** and applicant's motion to reopen its time to file its main brief is **DENIED**.

Applicant's trial brief (filed September 17, 2013) will be given no consideration. Opposer's reply brief (filed September 26, 2013), will not be considered.

This case is ready for submission on brief.

Applicant's request for oral hearing is noted.

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<sup>2</sup> For purposes of making the excusable neglect determination, it is irrelevant that the failure to timely take the required action was the result of the party's counsel's neglect and not the neglect of the party itself. Under our system of representative litigation, a party must be held accountable for the acts or omissions of its chosen counsel. See TBMP § 509.01(b)(1) (3d ed. rev.2 2013) and cases cited therein.